

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

ROGER E. NEWELL

FILE NO. MUP-90-064(DD)
APPLICATION NO. 8905920

from a decision of the Director of the
Department of Construction and Land
Use on a master permit application

Introduction

Appellant, Roger E. Newell, appeals the decision of the Director of the Department of Construction and Land Use (DCLU) to deny a request for a design departure on one of two proposed projects at 4527 - 45th Avenue S.W.

The appellant exercised the right to appeal pursuant to the Master Use Permit Ordinance, Chapter 23.76, Seattle Municipal Code.

This matter was heard before the Hearing Examiner on November 15, 1990. The record was left open to allow for a site inspection. The site inspection was conducted on November 16, 1990.

Parties to the proceeding were: the appellant, Roger E. Newell, pro se; John M. Orehek, developer; and Faith Lumsden, land use specialist, for the Director of DCLU.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code unless otherwise indicated.

After due consideration of the evidence elicited during the public hearing and a site visit the following shall constitute the findings of fact, conclusions of law, and the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The subject property is located at 4527 - 45th Avenue S.W. The site is a rectangular parcel which measures 200 ft. long by 117 ft. deep. The site is approximately 23,400 square ft.

2. The subject property is zoned Lowrise 2. Zoning on the east increases in intensity from Lowrise 3, immediately across the street to Neighborhood Commercial 2 and 3 with height limits of 40 ft., 65 ft. and 85 ft. The area west, north and south is zoned single family.

3. The project proposal is to demolish four existing residences, comprising 6 dwelling units, and construct two nearly identical apartment buildings. The building to be located on the northern part of the site (the north building) qualifies as terraced housing because of the steep slope of the site on the northern end. The north building is not at issue in this proceeding.

4. The proposed south building does not qualify for terraced housing because the southern portion of the site does not have qualifying steep slopes.

5. The appellant has applied for a design departure to allow the south building to exceed the maximum width and depth standards and to provide less than the required modulation.

6. The code allows a maximum building width of 60 ft. and a maximum depth of 70 ft. The project proposal is for a building 75 ft. wide and 78 ft. in depth.

7. The project as proposed will have 5 levels. Each floor would step back from the floor below. The decks would have 6 ft. open to the sky and 4 ft. covered by the floor below. The fourth floor would have a large open roof deck of about 1800 square ft. The deck spaces are private and only accessed by the tenants of the individual units.

8. The proposed south building will have 12 units, 9 tandem parking spaces in the basement and 15 spaces along the west property line that will be shared by both buildings.

9. Under the code alternative, the private decks would be considerably smaller, measuring approximately 4 ft. in depth and covered by the floor above. Under the code, the fourth floor deck would have more depth, but would be 15 ft. narrower.

10. The south building is not designed with solar passive systems, nor does the appellant claim the design would allow for energy conservation. The increased solar exposure will result from the large deck spaces, with approximately 6 ft. of direct solar exposure. Because the building will face the west, there will be good solar exposure regardless of the large decks. The larger decks will allow for greater open sky solar access than the smaller decks allowable under the code.

11. The proposed design will provide better individual amenities for the individual occupants of the units in the form of large decks and increased interior space, but there will be no increase in common use amenities for the residents or amenities for public use.

12. The topography of the steeply sloping site restricts the amount of common ground level open space available to the residents. The appellant contends the larger deck area is designed to compensate for the lack of common open space.

13. Under the proposed project, the views of Puget Sound from the proposed project would be to the southwest. The increased bulk of the building will minimize the view corridor regardless of whether the sound is viewed diagonally or straight ahead.

14. The proposed project will increase the number of dwelling units from six currently on the site to 12 units in the proposal, but will not preserve existing housing.

15. The neighborhood is architecturally diverse. There are small single family houses as well as large multi-family dwellings. There is a terraced residential structure under construction at the end of the block. The north building will be the second terraced building on the block.

16. There are no historical or architecturally significant structures in the area.

17. The proposed project does not involve parking related issues.

18. The appellant was required to submit building design plans for an alternative design which meets required building codes. The alternative building without the design departure, would have to be moved much closer to single family homes to the west, thereby removing some of the buffer effect of the proposed building.

19. The developer has modified the proposed building plans to address some of the concerns expressed by the neighbors in a prior request for a design departure for a building south of the proposed project.

20. The appellant contest the apparent lack of consistency of DCLU design departure decisions. The appellant references the approval of the design departure request for a similar project on the same block. The DCLU representative distinguished the other project from this proposal because in the earlier case DCLU concluded that the design departure resulted in a better design. In the instant case, DCLU contends the proposed design departure just results in a bigger building.

21. There may be another option for constructing the proposed project on another location on the site with out a design departure, but DCLU would have to reopen their review process to consider the alternative proposal.

22. Prior to the hearing, eight neighbors submitted comment letters to DCLU. The neighbors expressed opposition to the entire project, concerns regarding traffic impact and slope stability, and ground water run off. Most of the neighbor's concerns were addressed in the SEPA determination, which is not under appeal. None of the neighbors testified at the hearing.

23. The developer testified that allowing the design departure will make the proposed project more compatible with the other terraced building currently under construction and the north building which was approved for future construction.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to the provisions of SMC 23.76.022. Under that section, the Director's decision on design departure applications is entitled to substantial weight.

2. Seattle Municipal Code Section 23.40.010 provides that a design departure may be permitted in multi-family zones for design solutions which result in a better development than would be possible under development standards for the applicable zone. Design departure may be permitted for one of the following reasons:

1. To improve solar access, energy conservation or use of passive energy systems;
2. To provide better amenities on the site for common use of residents such as well equipped open spaces (playground equipment, benches, picnic tables, play courts) or increased quality and quantity of landscaped open space;
3. To provide amenities for public use;
4. To minimize view obstruction;
5. To use techniques other than modulation to reduce the appearance of bulk;
6. To preserve existing housing;
7. To preserve a desirable existing architectural and siting pattern in an area
8. To preserve historically or architecturally significant structures;
9. To provide a parking solution uniquely suited to the location.

3. Though not clearly stated in the ordinance, the inference is that a design solution which incorporates one or more of the nine criteria will result in a better development.

4. Applying the above criteria to facts found above, it is clear that the proposed project does not qualify for a design departure under 8 of the 9 criteria. The proposed project qualifies for a design departure only because the design improves solar access. Solar access is not defined in the design departure ordinance, it is defined in the definition section of the Land Use Code. SMC 23.84.036 states:

solar access means the amount of unrestricted sunlight which reaches a structure, or portion thereof.

Under this definition of "solar access" the decks in the proposed project which allow, at a minimum, 6 ft. more of "unrestricted sunlight" than the code alternative satisfies the criteria of "improved solar access" in SMC 23.40.010.

5. The conclusion herein is compelled by language of the design departure ordinance which does not give clear direction of the drafter's intent. It is not clear that the drafters of the ordinance intended to allow project designers to qualify for a design departure simply because the designer adds a bigger deck to the project. The code provision fails to provide guidance on what standards should be applied in analyzing when the criteria results in a better development. For example, should there be a

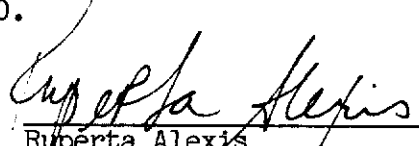
relationship between the extent of the design departure requested and the amenity provided. Is the design departure request to be limited to the "minimum necessary" to qualify? (See variance standards)

In the absence of direction in the ordinance or history of the drafter's intent, the plain language of the code compells the result herein. The ambiguities or uncertainties in the language of the code must be construed against the drafter.

Decision

The decision of the Director is reversed. The proposed project qualifies for a design departure.

Entered this 26th day of November, 1990.


Ruperta Alexis
Deputy Hearing Examiner

CONCERNING FURTHER REVIEW OF
HEARING EXAMINER FINAL DECISIONS ON MASTER USE PERMITS

The decision of the Hearing Examiner in this case is final and is not subject to reconsideration except to correct errors on the ground of fraud, mistake, or irregularity in vital matters. Any party's request for judicial review of the decision must be by application to King County Superior Court for a writ of review within fifteen calendar days of the date of this decision. Seattle Municipal Code Section 23.76.22(C)(12)(c).

If the Superior Court orders a review of the decision the person seeking review must arrange for and bear the cost of preparing a verbatim transcript of the hearing, but will be reimbursed if successful in court. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, Room 1320 Alaska Building, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.